

The Downstream Effects of State Secession: New States and Treaty Obligations over Territory

Pierce Randall

Usually, we think of secession as a bilateral conflict involving the interests of two parties:

the region seeking to form a new state and the state they seek to leave. Sometimes third parties may claim to have an interest in whether or not another region secedes, though these claims often turn out to be morally dubious. (Consider, for example, the interest Russia takes in secessionary movements in Georgia and Eastern Ukraine.) In this paper, I am going to discuss a kind of case in which third parties *do* seem to have legitimate interests that are affected by the self-determination of a newly-formed state. Sometimes the creation of a new state has downstream effects on the management of transnational resources and environmental policy. I will focus on the implications state secession has for international agreements affecting transnational rivers.

I am concerned with the following question: when the people of a region exercise a valid moral right to secede and form a new territorial entity, are they obligated to continue following agreements for the management of water resources made by the state it is seceding from? And if newly-formed states are not obligated to accept the terms of such treaties, should international law recognize this? This may seem like a narrow question, but it has concrete implications. In 2011, South Sudan seceded from Sudan. Prior to secession, Sudan and Egypt have allocated water rights to the Nile river according to the terms they negotiated under the 1959 Nile Waters Agreement. As a former part of Sudan governed under that treaty, is the new state of South Sudan obligated to continue to abide by its terms? South Sudan is underdeveloped. The Sudanese government has perhaps been insufficiently motivated to ensure that the south would benefit from decisions they make regarding the use of the Nile. Should South Sudan be allowed to take more than the share of water allotted to it by the 1959 agreement, even if doing so will leave less water downstream for Egypt? Egypt certainly has an interest in whether or not South Sudan continues to follow Sudan's treaty agreements, but does it have a moral claim right against South Sudan for the water Sudan agreed to provide it? Should international law recognize such a right? This may not be an isolated problem. There are other rivers that span the national boundaries of several states: the Jaldhaka and Dharla river system in South Asia, the Rhine and Danube in

Europe, and the Mekong in East Asia. With the possible exception of the Rhine, countries in each of these regions have or have had in recent memory active secessionist movements. So the puzzle over South Sudan's obligations to Egypt regarding the Nile may replicated elsewhere in the world as new states are formed while water becomes an increasingly scarce and contested resource.

I will argue that new states are morally obligated to accept the terms of treaties of secession only if the governments that negotiated those treaties exercised legitimate jurisdiction in the region that has seceded. I outline three conditions that form a minimal account of when an existing state is legitimate: it must respect basic human rights, have representational legitimacy over the regions they control (e.g., they employ some kind of democratic or consultation procedure with citizens in the regions they control), and its political structure must exhibit a minimum degree of reciprocity such that it takes into account the interests of people who live in the regions over which it exercises jurisdiction. Nevertheless, it may still be the case that new states have other duties not dependent on treaties to work to fairly manage transnational resources. I hope that the approach I defend will generalize beyond water conflicts, providing guidance to addressing other areas of transnational governance due to the formation of new states.

In the first section of this paper, I attempt to give an inclusive, and so theoretically neutral, account of the right of a region to secede and form a new state. In the second section, I discuss some approaches to the succession to treaties covering the jurisdiction of resources and territory by new states. In the third section, I lay out my minimal account of legitimacy. There, I argue that new states are not morally bound by treaties negotiated by governments of their previous state that ruled illegitimately. In section four, I consider the objection that international law should aim foremost at providing stable expectations, and so should not recognize the moral right of new states to ignore or renegotiate agreements that affect third parties' expectations to a scarce and important resource such as water. There I also consider other moral obligations new states may have to enter into reasonable agreements about sharing water rights.

1. An inclusive account of state secession

The discussion about whether or not groups have a right to secede is sometimes framed in terms of whether or not subjects may leave the legal authority of an existing state. However, as Linda Brilmayer points out, that “[s]ecessionist claims involve, first and foremost, disputed claims

to territory.”¹ When a group secedes, not only do its members leave a state, but they also take the region they occupy with them in order to form a new state.² Because of this secession is a transfer of jurisdiction over territory. It necessarily involves removing or limiting the rights held by the state losing territory. So the the right on the part of some regions to secede requires some kind of moral basis.

It seems clear that at least sometimes regions have a right to secede. One case in which this right seems obvious is when it occurs as the result of a bilateral agreement with the state that currently controls a territory. For example, the Scottish independence referendum in 2014 was authorized by the British parliament, which resolved in advance to accept the result of the referendum whatever Scottish voters decided. Had the result been in favor of independence, then this would have been a case of bilateral secession. I assume that at least sometimes states may voluntarily cede jurisdiction of territory to new governments. There may be circumstances under which agreements allowing regions to secede are not binding: for instance, cases in which the agreement is achieved through force or deception or when it is made with an illegitimate government. However, it seems true that in general states can agree to let a region form its own state in a way that makes secession permissible.

In cases where the government of an existing state is coerced or forced into agreeing to let a region leave, the story is more complicated. For instance, the referendum that resulted in independence for South Sudan in 2011 was based on a Comprehensive Peace Agreement between the people of South Sudan and the Sudanese government. But Sudan’s political leaders may have felt the need to make that agreement in order to end a 22-year civil war for the independence of South Sudan that resulted in the deaths of over a million people. When agreement is achieved through coercion or the use of military force, the agreement itself does not confer any special moral status on what is being agreed to. Might does not make right, and agreement only provides a moral justification for a right when that agreement is uncoerced. In cases of agreement resulting from military conflict or the threat of force, what matters is whether or not the separatists have just cause to use force or coercion, and whether or not secession is an appropriate remedy for their reasons

¹ Linda Brilmayer, “Secession and Self-Determination: A Territorial Interpretation,” *Yale Journal of International Law* 16 (1991): 178.

² It need not always be the case that secessionist movements seek to form new states. Some secessionist movements seek to break away from an existing state in order to join another, such as South Ossetia’s effort to join Russia. In any case, the case of secession to join another state should not complicate the account I give here.

for doing so. In the case of South Sudan, the relevant issue is whether or not the interests of the south Sudanese people in autonomy or ensuring that their human rights were adequately protected constituted a just cause for civil war, and whether or not achieving independence was an appropriate way to satisfy these interests. When new states are formed by agreements ending conflicts, the permissibility of their secession ultimately depends on whether or not they have a right to form a new state that does not depend on the agreement of the existing state strong enough to justify engaging in the conflict. In other words, what matters is whether or not the party seeking independence has a unilateral right to form a new state.

A unilateral right to secede does not depend on the agreement or acceptance of the state with prior jurisdiction over the region in question. It seems plausible that sometimes the people who live in a region possess such a right. Colonies usually, if not always, have a right to secede from the powers that exercise jurisdiction over them. Even international law—which, as it is written by existing states, may sometimes reflect a conservative bias to preserve present borders—recognizes the right of a colonies to secede.³ So there seems to be widespread agreement that at least some regions have a unilateral right to secede. However, there is disagreement over whether or not this is a presumptive right or only a remedial one: is the ambition of the people who occupy a region to form a new state itself sufficient for them to have a right to secede, or is secession only permissible if the state they currently live under is illegitimate? Some theorists such as Margaret Moore and Kit Wellman have defended the view that nations or political communities have a presumptive right to self-determination justifying their attempts to secede.⁴

Conversely, Alan Buchanan has argued that secession is only a remedial right, so that a region may only secede in response to illegitimacy on the part of the state that currently controls that region.⁵

Because I aim to give an inclusive account of the right to secession, I do not wish to address whether or not the right to unilaterally secede is a presumptive or remedial. What is important for my purposes is just that both parties agree that unilateral secession is sometimes permissible. So

³ Colonies pass the so-called “saltwater test” recognized by international law by being an overseas dependencies, and therefore have a presumptive right to independent governance.

⁴ Margaret Moore, *The Ethics of Nationalism* (New York: Oxford University Press, 2001), ch. 8; Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination* (New York: Cambridge University Press, 2005).

⁵ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), ch. 8.

an inclusive account of secession includes a right to unilaterally secede under certain circumstances, and does not take a stand regarding what those circumstances might be. As we have already seen, the permissibility of secession as a result of bilateral agreement is also non-controversial. In section three, I consider both unilateral and bilateral cases of secession when discuss the conditions under which new states are bound by the treaty obligations of their predecessors.

Even if regions sometimes have a moral right to secede, it may not follow that international law should recognize or protect such a right. As Buchanan argues, showing that there is a moral right to secede is not sufficient to show that international law should recognize this as a legal right.⁶ It is also important to consider what the consequences of such a legal right might be, including whether or not it would establish effective legal incentives for existing states to take seriously claims to regional autonomy that fall short of demands for separate statehood. Buchanan objects to legally recognizing a presumptive right on the part of groups to unilaterally secede because, he argues, such a right might make existing states unwilling to grant regional autonomy for fear that this might lead to legally recognizable claims for separate statehood.⁷

I do not take a position as to whether or not such worries over the consequences of recognizing a legal right to self-determination are ultimately decisive reasons to think that such a right should be constrained. For the inclusive account I am giving, it is only important to point out that such consequences are unlikely to entirely rule out the legal recognition of some kind of unilateral right to secede. Even Buchanan acknowledges that groups have a right to unilaterally secede when ruled by they find themselves under illegitimate states.⁸ Some states treat the people who live under their jurisdiction quite badly. They routinely violate human rights or rule some of their subjects as an illegitimate occupying power. It would be difficult to argue that secession could never be an appropriate remedy in such cases. Since these practices are already illegal under international law, the states that engage in them may already be insensitive to sanctions from the international legal community. It is hard to see what kinds of incentives international law could provide that might cause illegitimate states to change their ways. Therefore, the inclusive account can also claim at least a limited right of legal recognition for states that unilaterally secede in some

⁶ Ibid., 345-48.

⁷ Ibid., 377-78.

⁸ Ibid., 369-71.

circumstances. It is important for my purposes to flag the distinction between moral and institutional rights to secession. My position in section three is that international law should recognize that new states are not subject to treaty obligations when those treaties were negotiated by illegitimate predecessor states. In section four, I will consider the worry that this recommendation for international law would lead to perverse institutional incentives.

However, in the next section, I consider what rights the international legal community currently recognizes for new states regarding territorial agreements.

2. International law on the succession to territorial treaties

International law might constrain a new state's right to self-determination by requiring it to abide by obligations under treaties negotiated by its predecessor state. While the issue of state succession to treaties is one that philosophers typically ignore, this area has received a lot of attention from legal theorists. In this section, I discuss some of the positions in international law regarding treaty succession.

A theory of state succession aims to determine the conditions under which a transfer of sovereignty or jurisdiction also includes a transfer of the legal rights and obligations held by the previous sovereign entity under treaties and other agreements. One position that historically has had many defenders, the theory of *universal succession*, is the view that new sovereign powers always inherit *all* of the treaty obligations and privileges of predecessor states. Conversely, the *tabula rasa* theory of succession holds that new states inherit none of the treaty obligations of their predecessors. While these two positions may seem extreme, many alternative approaches are made in reference to them, so it is worth considering both.

According to the universal succession theory, sovereignty or the right to rule is tied to the legal personality of the sovereign. Medieval and early modern legal theorists typically understood sovereignty as invested in an individual, but even Thomas Hobbes accepted that this is not tied to the concept of sovereignty: sovereignty may also be invested in a corporate body such as an assembly.⁹ In both cases in which sovereignty is held by an individual and when it is held by a corporate body, it has a legal personality under international law. This consists in the rights and obligations tied to a sovereign's right to rule a territory, included those it acquires by agreements with other sovereigns. According to the theory of universal succession, a transfer of sovereignty

⁹ Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis, IN: Hackett Publishing Company, 1994), 104 (I.15).

involves transferring the legal personality of the sovereign to another entity, and along with it all of the rights and duties associated with that legal personality. According to Hugo Grotius, “the Person of the Heir is to be looked upon the same as the Person of the Deceased, in Regard to the Continuance of Property, either publick or private,”¹⁰ and that “they who inherit all the Goods of with the Kingdom, are without doubt obliged to perform all the Contracts and Promises of the late King.”¹¹ In other words, according to the universal succession theory, the legal personhood associated with one sovereign is continuous when the rights of sovereignty pass from one party to another. Since sovereignty is invested in states according to contemporary theories of international law, universal succession implies that when a new state obtains the right to rule a region from another state, it also inherits the previous state’s legal personality, including its status as party to treaties.

The tabula rasa theory of succession denies that there is any continuity of legal personhood in the transfer of sovereignty. This approach originated in the nineteenth century with the theory of legal voluntarism, the view that the law expresses the will of the sovereign.¹² If the law expresses the will of the sovereign, then presumably legal obligations cannot bind that will. Even if we do not find the view that all law is the will of the sovereign attractive, there may also be other considerations that favor a tabula rasa approach to succession. Those advocating versions of this view sometimes point out that treaty obligations negotiated by previous states can be burdensome to new states, and in many cases formerly dependent regions lacked representation when agreements with other sovereign entities are being negotiated.¹³

Neither the of these approaches seems satisfactory. Universal succession seems morally arbitrary and potentially unfairly burdensome. It seems to stick new states with possibly onerous burdens agreed to by the governments of previous states, even when the previous state was illegitimate and there is no obvious relationship between it and the new state. The notion of treating sovereign succession like a kind of inheritance may have seemed to make sense when sovereignty was invested in monarchs who sometimes treated their titles and prerogatives to rule as personal

¹⁰ Hugo Grotius, *The Rights of War and Peace*, book 1, ed. Richard Tuck (Indianapolis, IN: Liberty Fund, 2005), 684.

¹¹ *Ibid.*, 811.

¹² Matthew Craven, “The Problem of State Succession and the Identity of States under International Law,” *European Journal of International Law* 9 (1998): 148.

¹³ Hubert Beemelmans, “State Succession in International Law: Remarks on Recent Theory and State Praxis,” *Boston University International Law Journal* 15 (1997): 96n.

property, but it is more problematic now, given that new states may “inherit” jurisdiction by regime change or decolonization. By contrast, the tabula rasa approach to treaty succession seems to leave open the possibility of legal chaos when it becomes unclear whether new states will uptake any agreement made by their predecessors. Additionally, a tabula rasa approach to international law may create perverse incentives on the part of neighboring states, which will have strong selfish reasons not to recognize secessionist movements that risk undermining legal agreements they count on.

The period of legal turmoil following the widespread decolonization of Africa and southeast Asia in the 1960s and 70s led to new approaches to succession on the part of new states. One proposal that has been influential in the management of the Nile River basin is the Nyerere Doctrine, so named after the influential Tanzanian Julius Nyerere. According to the Nyerere Doctrine, new states should continue to fulfill the treaty obligations for two years after independence, after which point it would be free to disregard or seek to renegotiate those treaties.¹⁴ This approach is similar to the tabula rasa doctrine, in that it is motivated by the view that new states should ultimately be free from obligations negotiated by previous sovereign entities, but seeks to avoid the legal chaos and shock to other countries’ reasonable expectations that may come with a sudden unilateral departure of a region from all of its legal obligations.

Since Nyerere was an influential leader of a post-colonial African state, his proposal was influential to other sub-Saharan states, including other Nile riparians such as Ethiopia, Kenya, Malawi, and Uganda in their dealings with downstream states such as Sudan and Egypt. However, since the 1959 Nile Waters Agreement was favorable to the latter countries, they have been unwilling to recognize the right of their upstream co-riparians to leave the legacy agreement. The Nile River Basin is currently governed by a patchwork of agreements between different states, with a clear divergence of positions between Egypt and Sudan, which insist that the 1959 agreement is still binding, and other states that insisted on renegotiation.¹⁵

While the Nyerere Doctrine is better than the unqualified tabula rasa approach, it also has drawbacks. For one thing, it seems morally arbitrary. Why two years, and not a longer period of time? In any case, states may form expectations that extend indefinitely into the future when they

¹⁴ Cf. Mohamed S. Helal, “Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement,” *Emory International Law Review* 27 (2013): 941.

¹⁵ *Ibid.*, 941-43.

expect the legal framework that underwrites such expectations to be stable. Egypt is entirely dependent on the Nile to provide drinking water for its population; it is not clear what steps it could take in two years or for any length of time to adapt to the expectation that its upstream neighbors are no longer willing to guarantee that it receives a sufficient amount of water to meet its citizens' needs.

One way to overcome the problems with universal succession and tabula rasa theory as well as compromise positions such as the Nyerere Doctrine is to distinguish between the types of treaty rights and obligations new states might succeed to. It would be strange if certain types of obligations, such as military alliances, necessarily passed to successor states, since those states are often do not share the objectives or allegiances of their predecessors. However, it seems much less clear that successor states should not be bound by agreements of predecessor states regarding environmental management or the right of transit, which form the basis of reasonable expectations on the part of other sovereign entities. So we should look for some principled way to distinguish between the types of treaty obligations that new states will be bound to from those that they are not.

Emer de Vattel, the 18th century Swiss legal theorist, distinguishes between “personal” and “real” treaties. While sovereigns may commit themselves personally in agreement, only in certain instances do they commit the whole nation, such that these obligations pass to successors.¹⁶ For Vattel, real treaties include all explicit agreements of state, while personal treaties are limited to the personal agreements by a monarch. So this distinction may not seem terribly helpful, since all modern treaties are signed by governments on behalf of a state, not the individuals in power. However, over time this distinction has morphed into a present-day distinction in international law between personal and so-called “dispositive” treaty agreements by states. Today, states have replaced monarchs as the bearer of the legal personality of the sovereign. So personal treaties in international law include assurances on the part of a state, such as alliances and political agreements. Dispositive treaties are typically those that bind not the state itself but what it has a right to, namely, the jurisdiction of a particular region. Contemporary dispositive treaties are tied to the jurisdiction over a particular territory, and include agreements about boundaries, transit

¹⁶ Emer de Vattel, *The Law of Nations*, ed. Béla Kapossy and Richard Whatmore (Indianapolis, IN: Liberty Fund, 2008), 359 (II.xiii.191).

rights, and the management of common resources.¹⁷ This distinction accords with contemporary international law. The 1978 Vienna Convention acknowledges that state succession may not carry with it all of the legal obligation of the predecessor state. Nevertheless, articles 11 and 12 stipulate that state succession should not affect agreements about boundaries or the rights of foreign states to use a territory or its resources.¹⁸

Of course, to make a distinction is not to argue for it, and it is possible that present-day legal practice is not just. Still, there may be virtues to this approach in that disappointing another state's expectations to access some territory or some resource such as water can be more serious than denying it the benefits of alliances or trade agreements. Promoting stability in the use of resources such as rivers for drinking water may be important enough to require new states to honor those expectations when they are grounded in legitimate treaties. Still, I do not to argue for the practice in international law of requiring new states to honor territorial treaties. Instead I take this distinction as a starting point for a new state's obligations under treaty succession. In the next section, I argue for a revisionist thesis that such treaties can only bind current states if they are negotiated by minimally legitimate states.

3. Minimal criteria of legitimacy and the obligations of new states

When new states automatically succeed to the treaty obligations of predecessor states, their ability to exercise the right to self-determination on behalf of the people they represent is consequently limited. Instead of being free to determine for themselves what kinds of obligations they will undertake in managing their resources or territory, international law requires new states follow the agreements made by predecessor states in the case of territorial treaties. So whether new states such as South Sudan have a valid legal requirement to continue to fulfill treaties negotiated by predecessors depends on when the international legal community may permissibly restrict a state's exercise of self-determination over its own resources.

Presumably, international law can sometimes permissibly place limits on state self-determination. If it could not, then international law could never permissibly restrict the activity of states that it legally recognizes as carrying out the will of their populations. Here I do not offer

¹⁷ D. P. O'Connell, "Recent Problems of State Succession in Relation to New States," *Recueil des cours* 130 (1970): 105-15 & 189-93.

¹⁸ Helal, 967-68.

a theory of when international law can restrict self-determination. However, I will argue that a necessary condition for the permissible enforcement of treaties is that those treaties are negotiated by legitimate states. That means that a new state should not be subject to the obligations agreed to by the state that previously held jurisdiction over its territory when the predecessor state exercised that jurisdiction illegitimately.

Following Buchanan and other authors, I understand political legitimacy as the justifiability of an entity's exercise of political power.¹⁹ Laws are ultimately backed by the coercive power of the state. A state sanctions individuals who violate its laws, and the international legal community uses sanctions to attempt to compel states to comply with its directives. A system of laws is legitimate when it is permissible for states or other entities to use power to enforce it. We might think that political legitimacy is a holistic of an entity, so that it can only be legitimate when every exercise of its political power is permissible. Alternatively, we might conceive of legitimacy as piecemeal, so that the use of political power by an entity in some areas is permissible while in others it is not. I leave open the possibility that legitimacy may be piecemeal, so that a state may permissibly exercise political power in one area and not in others. The appeal of the piecemeal approach to legitimacy for understanding jurisdiction rights over territory is that it leaves open the possibility that a state may permissibly exercise legal power in one region it controls but not in another. This seems like a plausible way to understand the moral status of states that other otherwise legitimate but possess colonies. Prior to 1947, the government of the United Kingdom may have permissibly wielded political power in Britain, but is probably did not in India. In any case, I will talk as though a state's actions within a region can render its jurisdiction of that region illegitimate. Whether or not this makes its jurisdiction of other regions illegitimate is irrelevant for my purposes.

When a state lacks legitimacy over a region, it does not have a right to enforce legal directives against the people who occupy that region. Since one may not permissibly agree to do what one lacks a right to do, states that lack the right to exercise political power over a region also lack the right to sign agreements with other states intended to apply coercive legal force over

¹⁹ Buchanan writes: "an entity has political legitimacy if and only if it is morally justified in exercising political power." See Buchanan 233 & passim. Political legitimacy is distinct from political authority, or the moral obligation on behalf of those subject to the law to follow it. I have nothing to say about political authority, only whether or not agents may be legitimately required by international law to follow treaty obligations.

people who occupy that region. When such agreements are codified into legally binding treaties, the legal requirements of those treaties are illegitimate.

Recall that in section one, I was agnostic as to whether or not the right of unilateral secession is presumptive or remedial. If a region has a presumptive right to secede, then its representatives do not have to demonstrate that the state that controls it is illegitimate in order to have a right to form a new state. On the other hand, if the right to unilaterally secede is only remedial, then regions seeking to form new states may only do so when the state that currently has jurisdiction is illegitimate. So the only way a state could be subject to legitimate treaty agreements when it secedes unilaterally is if a region has a presumptive right to exercise self-determination by forming a new state.

According to the inclusive account of secession, some instances of permissible secession are the result of bilateral agreement with previous states. Even if the state that presently holds jurisdiction over a region is illegitimate, representatives of that region seeking to form a new state may nonetheless find it prudent to seek agreement with the existing government in order to secede. Even if the current state has no rightful control over a region, it is usually better for a new state to avoid civil war with them if possible. If the representatives of a new state wish to avoid conflict by negotiating with an illegitimate state instead of exercising a unilateral right to secede, they should not simply for that reason be required under international law to accept treaty obligations the new state would not have been subject to had it been formed unilaterally.

So far, my account of political legitimacy as it relates to treaties has been schematic. I have not given any substantive account of when a state is legitimate. It would be excessively ambitious to think that I could give a complete account here. However, I will discuss three necessary conditions any state must satisfy within a geographic region in order to legitimately exercise jurisdiction over it. I do not mean to suggest that satisfying these criteria is jointly sufficient for a state to be legitimate.

1. In order for a state to legitimately exercise jurisdiction in a region, it must minimally respect the basic human rights of those who live there. For my purposes, a basic human right is one the violation of which makes it difficult to lead a decent life.²⁰ This will generally include rights to security (including the right to basic material subsistence), rights against many

²⁰ Cf. Buchanan, 128-30.

kinds of violations of bodily integrity or violence, the right against being subject to arbitrary legal coercion, and the right to freedom of movement. (This is not a complete list.) It is hard to see how any political regime could be justified when those subject to its political power are routinely unable to live minimally decent human lives. Given the gravity of such violations, states that fail to respect human rights do not have a claim against other groups who want to establish alternative legal regimes that would do a better job of securing those rights. Therefore, it is impermissible for a state that violates human rights to exercise legal coercion over a group that forms a new state within a region.

2. States that legitimately control a region bear some kind of consultative or representative relationship to those in the region they govern. My claim is not that this relationship need to be fully democratic (although democracy may be necessary for legitimacy; recall that I am not seeking give sufficient conditions for a state to be legitimate). Rather, there must be some mechanism by which those living in a region may be assured that those who govern them are sufficiently sensitive to their interests. This may take the form of democracy, or it may involve only sincere consultation between local leaders and the national government before enacting legal proposals. Members of the region should not be a permanent minority in a way that they persistently lack a voice when the government of a state deliberates about new laws or treaties that affect a region. The use of coercive legal force in a region that ignores the will of those subject to it should restrict future democratic political decisions they might make.

3. The legitimate exercise of a legal coercion within a region is not exploitative; it achieves some degree of reciprocity by ensuring that members of the region do not undertake significant burdens of a legal regime that in no way benefit them. When a state undertakes its legal decisions within a region solely for the benefit of those who live outside of a region, such as residents in other regions or political or economic elites, its use of power to enforce those decisions is impermissible. This does not mean that every decision a state makes must benefit the region under consideration. However, a geographic region that is persistently underdeveloped despite the aspirations of those residing within it is wrongfully subject to the legal coercion that sustains this relationship. It is easy to see how treaties may run afoul this condition. A state may decide to sacrifice the interests of one region under its control in order to secure benefits for other regions

by making agreements with other states that manage to exploit those who live within the disadvantaged region.

States that fail any of these criteria with respect to some region do not legitimately exercise jurisdiction over that region. On the account I have given, it follows that it is wrong for those states to seek to impose legal obligations, including those arising from treaties, on residents of those regions, and it is wrong for the international legal community to require new states to act according to the terms of treaties negotiated by illegitimate states. If I am right, this is a significant normative conclusion, because it is contrary to a widespread view in existing legal theory. As I pointed out in section two, many legal theorists think that international law requires new states to succeed to dispositive treaties of former states, even if those treaties were negotiated by illegitimate states. According to the account I have given here, that requirement is too strong. International law should not require new states to succeed to the territorial obligations of predecessor states when those states lacked legitimate jurisdiction. This means that most former colonies, as well as states that broke away from oppressive regimes, should begin statehood without being obliged to follow the agreements of their predecessors.

What are the implications of this account for whether or not South Sudan is obliged to uphold the 1959 Nile Waters Agreement? Since Britain left Sudan in 1956, the most clear regional division in the country has been between the more populous and dry northern region inhabited by Arab Muslims, and the southern region containing multiple tributaries of the Nile river inhabited by sub-Saharan Africans who practice Christianity and local belief systems. Sometimes, the conflict between northern and southern Sudan has been portrayed as primarily religious, with the south unwilling to accept proposals by the central government in Khartoum to implement Sharia law. However, according to Douglas Johnson, the ultimate roots of political division between the two regions resulted from exploitative governance.²¹ While the conflict between the regions is multifaceted, involving competing claims over oil resources as well as water, one significant point of contention has been competing claims over water. Prior to the beginning of the second Sudanese Civil War in 1984, Sudan and Egypt have repeatedly pressed to build the Jonglei Canal, which

²¹ Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars* (Bloomington, IN: Indiana University Press, 2003), xvii-xx.

would divert tremendous quantities of water yearly from the Sudd wetlands in the south to northern Sudan and Egypt for agricultural and agrarian uses.²²

When representatives from the south protested the central governments proposal for the canal in 1974, they were arrested or forced to flee the country in the wake of a government crackdown on demonstrations.²³ Khartoum proposed minor benefits to southern regions affected by the canal project, including transportation improvements and draining and drinking water improvements, but it repeatedly failed to follow through with these agreements while attempting to build the canal. With its behavior toward southern Sudan while building the Jonglei canal, according to Johnson, “Khartoum proved itself to be more concerned with the extraction of the South’s resources with a minimum return for the region itself, an attitude more in keeping with the old Sudanic states’ exploitation of their hinterland than with modern nation-building.”²⁴ Unsurprisingly, with the outbreak of war, the Sudanese People’s Liberation Army halted construction on the dam, which remains unfinished today.

While demanding greater access to water from the Nile river, successive governments of the Sudanese state have maintained an exploitative relationship with the south. Additionally, their failure to take seriously the concerns of representatives from the south demonstrates an unwillingness to take their interests into account. Finally, the most glaring failure of legitimate governance by Sudan in the south is its serious and systematic violation of human rights, including attacks on civilian populations, forced population relocations, and supporting militias that committed atrocities and captured civilians as slaves.²⁵ In light of these failures, the new state of South Sudan is not legitimately constrained by the treaty obligations of north Sudan, and so may permissibly press for renegotiation of its water rights with Sudan and Egypt.

(Tragically, in 2015 South Sudan now finds itself in the midst of a full-scale civil war of its own. The present state may be unable to protect the human rights of its population after independence, and therefore may itself be unable to legitimately exercise legal force over the territory under its jurisdiction.)

²² Ibid., 47.

²³ Ibid., 48.

²⁴ Ibid.

²⁵ Ibid., passim.

4. *The impact on third party states*

The argument in the previous section focused on when the treaties of predecessor states are should be binding on new states. Lost in this discussion seems to be the morally significant interests of parties to treaties other than the predecessor state. According to my account, if a state has a treaty agreement over managing water rights with another state that turns out to be illegitimate, it may not permissibly hold regions that secede from the illegitimate state to the terms of the treaty. That may seem unfair. Egypt certainly has a reasonable interest in South Sudan providing it with adequate water resources according to its agreement with Sudan. Sudan, its treaty partner, turned out to be an illegitimate state, but that is not Egypt's fault. Its government did not illegitimately control southern Sudan or violate its residents' human rights. Why should it now be subject to uncertainty regarding its access to water?

First, it is important to point out that the non-recognition of South Sudan's obligations under the 1959 agreement is not intended as punishment for Sudan's illegitimate governance of its former population. The reason the treaty does not bind the new state of South Sudan is that Sudan lacked the right to subject residents of the southern regions to its laws. Egypt also lacks, and never claimed, legitimate legal authority over southern Sudan. Had South Sudan been an independent state in 1959 and was unwilling to negotiate a treaty guaranteeing Egypt a certain amount of outflow, Egypt would lack the legal authority to impose such a legal requirement on South Sudan. So while Egypt may have important interests in what South Sudan does, those interests are not sufficient to establish a legal obligation on the part of South Sudan to follow laws in the absence of agreement by a legitimate government of that region.

It is important here to mention that nothing I have said in this section or the previous one denies that the South Sudanese state may have *other* reasons that oblige it to negotiate a new agreement ensuring an adequate water supply for both Egypt and Sudan. Cara Nine has argued that in cases where the impact to the management of a transnational resource is highly asymmetric, so that one party is able to impose significant costs to other parties as in the case of managing transnational rivers, upstream states may be normatively obliged to consult with downstream neighbors when exercising their resource rights. According to Nine, a better institutional arrangement would be for the parties involved in the Nile basin to invest an interstate governmental

body with the legal authority to manage states' competing claims to resources.²⁶ At least under some circumstances, I agree with this position. A country's demand for water resources for development or for the survival of its population is an important one. Without some say in the security of its existing water resources, downstream states may be subject to domination by upstream neighbors. Further, impartial international governance of such resources help build trust and stability in regions where resource conflicts cause states to have strained relations, as is the case with South Sudan and its upstream neighbors. My position in this paper is only that treaties about managing water resources signed by illegitimate states should not bind new states, not that new states have no moral obligations to their downstream neighbors. My account leaves open the conclusion that new states may be obliged to come to some kind of fair agreement over water resources with other states affected by their decisions, and this should allay the worry that my account is insufficiently sensitive to the concerns of third parties whose treaty rights are adversely affected by state secession.

Even if a new state has an independent obligation to be sensitive to its neighbors' demands, my proposal may seem to invite negative consequences for attempts to negotiate treaties regulating transnational resources such as rivers. If governments are aware that their rights under treaties may lack international legal recognition if one of the parties turns out to lack legitimate jurisdiction over a region with an active secessionist movement, they may be excessively cautious and unwilling to enter into such treaties in the first place. According to this objection, my account has perverse incentives when understood in a broader institutional context of states' expectations under international law: even if new states might not be morally obliged to accept treaty obligations negotiated for them by their predecessors, failing to acknowledge that those obligations are legally binding on them will cause states to be unwilling to enter into agreements managing resources that cross jurisdictional boundaries.

Since my proposal is about what kind of obligations international law should recognize, I acknowledge that the incentives created under my proposal are relevant considerations. However, I think that undermining confidence in the legal bindingness of treaties negotiated by illegitimate states would not have perverse institutional consequences. First, new states often ignore territorial

²⁶ Cara Nina, "When Affected Interests Demand Joint Self-Determination: Learning from Rivers," *International Theory* 6, no. 1 (2014): 157-74.

treaties anyway whether or not they are permitted to. Even though international law holds, wrongly according to my account, that these states are obligated under treaties negotiated by their predecessors, the sanction of the international legal community is not sufficient to force states to comply. There is no evidence that the varying approaches sometimes adopted by new states contrary to legal convention affects the willingness of other states to sign treaties. One plausible explanation for why the behavior of new states fails to translate into expectations about the effectiveness of treaties is that it is difficult to predict the formation of new states, given that such events are not exceptionally common.

Second, nothing prevents new states from voluntarily committing to the terms of treaties signed by predecessors even when they are under no obligation to do so. Many treaties are mutually advantageous to both parties, and often there will be no way for a new state to leverage the fact that they are not required to accept the agreement in order to extract more favorable terms. States should have every reason to expect that new states will want to abide by treaties that contain ongoing rights and obligations that are beneficial to both parties. And it seems unproblematic to me if the account I have sketched disincentivizes states from entering into treaties that are to the obvious disadvantage of some region under the jurisdiction of their treaty partner.

Finally, if my account has any effect on states' willingness to enter into treaties for the management of shared resources, we should expect that it will make existing states more cautious about who they negotiate with. A state in Egypt's position may wish to take measures to encourage its potential treaty partner to take steps to reform its behavior before entering into agreements with it. When a state such as Sudan starts violating human rights or treating a region under its control in an exploitative manner, its treaty partners may condemn it or seek to sanction it. And if other parties are unwilling to enter into treaty agreements with states whose legitimacy is questionable, those states will have a powerful incentive to reform and gain the advantage of good international legal standing.

Conclusion

In this paper, I have canvassed the conditions under which the residents of a new state may exercise a right to self-determination and form a new state. According to a widely-held view in international legal theory, new states are bound by the territorial obligations of predecessor states.

I have argued for a revisionist proposal: that new states should not be bound by the treaties agreed to by previous states that lack legitimate legal authority over region contained in the new state. Therefore, the territorial treaties passed by those states should not bind new states under international law. While this may seem to unfairly impact other signatories of treaties, I have argued that new states nevertheless may be obliged to enter into agreements to manage resources such as rivers that cross national boundaries, especially when the impact of excessive use of such resources is asymmetric.

While this account has mainly focused a new state's obligations in the case of rivers, it may generalize to other areas of resource and environmental regulation as well. States may enter into treaties with other countries regarding transit rights, pollution, the management of lakes and wetlands, and the operation of canals. When these treaties are tied to a state's jurisdiction rights over a geographic region, it will be dispositive, so will normally require new states to accept those obligations in the event of secession. I have argued that this requirement should be qualified: new states should only be required to do so if the state that negotiated their obligations under the treaty legitimately exercised jurisdiction in the breakaway region. Given that many states lack legitimate jurisdiction over at least some regions that they control, the account I have given may provide guidance in other areas of territorial rights as well.